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David J. Schneider

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EXAMINER

ANDERSON, JAMES D

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**Please find below and/or attached an Office communication concerning this application or proceeding.**

The time period for reply, if any, is set in the attached communication.



## **DETAILED ACTION**

### ***Claims 43-51 are presented for examination***

Applicants' amendment filed 2/4/2008 has been received and entered into the application. Accordingly, claims 34-42 have been cancelled.

Applicants' arguments have been fully considered but they are not deemed to be persuasive. Rejections and/or objections not reiterated from previous Office Actions are hereby withdrawn. The following rejections and/or objections are either reiterated or newly applied. They constitute the complete set presently being applied to the instant application.

### ***Response to Arguments***

Applicant's arguments filed 2/4/2008 have been fully considered but they are not persuasive. Applicant presents the following arguments traversing the statutory double patenting rejections of claims 43-51 over USP Nos. 6,749,804 and 6,616,892.

Applicant argues that identical subject matter is not present in the claims under examination and claims 1-16 and 26-39 of USP No. 6,749,804 and claims 1-12 and 20-30 of USP No. 6,616,892. Applicant asserts that one can apply trichloromelamine such that it affects the production of ammonia and odors without applying so much that the pH of the habitat is lowered to less than 5 as recited in instant claim 43. This is not persuasive because Applicant in the 6,749,804 and 6,616,892 patents teaches that application of TCM in accordance with those inventions "has **indirect** insecticide properties" in that "by lowering the pH" the life cycle of certain insects is interrupted (*e.g.*, col. 5, lines 8-10 of the '892 patent and col. 5, lines 24-26 of the '804 patent). In other words, according to Applicant "...**by the application** of TCM to a

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habitat the pH is lowered to less than 5" (col. 5, lines 11-12 of '892 patent and col. 5, lines 27-28 of the '804 patent). As such, it is clear that the lowering of pH to less than 5 is a direct result of applying TCM to an animal habitat that is not distinguishable from the ammonia reducing and odor reducing properties of TCM. Further, it is noted that the concentrations of TCM applied in claims 9-12 and 33-35 of the '804 patent are identical to those recited in instant claims 49-51. It is not clear to the Examiner how the same concentrations of TCM can be applied to the same animal habitat and yet have patentably different effects as asserted by Applicant.

Accordingly, in the absence of a showing that TCM can be applied to an animal habitat in an amount that reduces the production of ammonia and odors without lowering the pH of the habitat to less than 5, the rejections are maintained for the reasons of record and as reiterated below.

### ***Double Patenting***

A rejection based on double patenting of the "same invention" type finds its support in the language of 35 U.S.C. 101 which states that "whoever invents or discovers any new and useful process ... may obtain a patent therefor ..." (Emphasis added). Thus, the term "same invention," in this context, means an invention drawn to identical subject matter. See *Miller v. Eagle Mfg. Co.*, 151 U.S. 186 (1894); *In re Ockert*, 245 F.2d 467, 114 USPQ 330 (CCPA 1957); and *In re Vogel*, 422 F.2d 438, 164 USPQ 619 (CCPA 1970).

A statutory type (35 U.S.C. 101) double patenting rejection can be overcome by canceling or amending the conflicting claims so they are no longer coextensive in scope. The filing of a terminal disclaimer cannot overcome a double patenting rejection based upon 35 U.S.C. 101.

### **U.S. Patent No. 6,749,804**

Claims 43-51 are rejected under 35 U.S.C. 101 as claiming the same invention as that of claims 1-16 and 26-39 of prior U.S. Patent No. 6,749,804. This is a double patenting rejection.

The instant claims recite a method of “controlling Darkling beetles” comprising treating an animal habitat with trichloromelamine *such that* the pH of the habitat is lowered to less than 5. The claims of the ‘804 patent recite methods of reducing the production of ammonia and odors in an animal habitat and “sanitizing” an animal habitat comprising applying an *effective* amount of trichloromelamine. The method steps of the pending claims and the claims of the ‘804 patent are identical. For example, both sets of claims recite treatment prior to the placement of animals in the habitat, treatment after placement of animals in the habitat, treatment prior to and after placing animals in the habitat, dusting and soaking the animal habitat, and concentrations of from about 25 ppm to about 1000 ppm. As such, the results of such treatment will be the same and are inseparable with respect to patentability.

As there is no evidence of record that applying trichloromelamine to an animal habitat in the amounts claimed in the ‘804 patent (which are the same as those instantly claimed) will not result in a lowering of pH and control of insects, the instant claims claim the same invention as that claimed in the ‘804 patent. In fact, at column 5, lines 24-31 of the ‘804 patent, it is disclosed that application of TCM **in accordance with this invention** has “indirect insecticide properties”. Accordingly, the Terminal Disclaimer filed 3/16/2007 cannot be used to overcome this rejection.

U.S. Patent No. 6,616,892

Claims 43-51 are rejected under 35 U.S.C. 101 as claiming the same invention as that of claims 1-12 and 20-30 of prior U.S. Patent No. 6,616,892. This is a double patenting rejection.

The instant claims recite a method of “controlling Darkling beetles” comprising treating an animal habitat with trichloromelamine *such that* the pH of the habitat is lowered to less than

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5. The claims of the '892 patent recite methods of reducing the production of ammonia and odors in an animal habitat (claims 1-12) and "sanitizing" an animal habitat (claims 20-30) comprising applying an *effective* amount of trichloromelamine. The method steps of the pending claims and the claims of the '892 patent are identical. For example, both sets of claims recite treatment prior to the placement of animals in the habitat, treatment after placement of animals in the habitat, treatment prior to and after placing animals in the habitat, dusting and soaking the animal habitat. An effective amount as recited in the '892 patent appears to be a 100 ppm solution of TCM sprayed on an animal habitat (col. 5, lines 55-56). As such, the results of such treatment will be the same and are inseparable with respect to patentability.

As there is no evidence of record that applying trichloromelamine to an animal habitat in "an effective amount" as claimed in the '892 will not result in a lowering of pH and control of Darkling beetles, the instant claims claim the same invention as that claimed in the '892 patent. In fact, at column 5, lines 8-13 of the '892 patent, it is disclosed that application of TCM **in accordance with this invention** has "indirect insecticide properties". Accordingly, the Terminal Disclaimer filed 3/16/2007 cannot be used to overcome this rejection.

### ***Conclusion***

**THIS ACTION IS MADE FINAL.** Applicant is reminded of the extension of time policy as set forth in 37 CFR 1.136(a).

A shortened statutory period for reply to this final action is set to expire THREE MONTHS from the mailing date of this action. In the event a first reply is filed within TWO MONTHS of the mailing date of this final action and the advisory action is not mailed until after

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the end of the THREE-MONTH shortened statutory period, then the shortened statutory period will expire on the date the advisory action is mailed, and any extension fee pursuant to 37 CFR 1.136(a) will be calculated from the mailing date of the advisory action. In no event, however, will the statutory period for reply expire later than SIX MONTHS from the mailing date of this final action.

Any inquiry concerning this communication or earlier communications from the examiner should be directed to JAMES D. ANDERSON whose telephone number is (571)272-9038. The examiner can normally be reached on MON-FRI 9:00 am - 5:00 pm EST.

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Ardin Marschel can be reached on 571-272-0718. The fax phone number for the organization where this application or proceeding is assigned is 571-273-8300.

Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see <http://pair-direct.uspto.gov>. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free). If you would like assistance from a USPTO Customer Service Representative or access to the automated information system, call 800-786-9199 (IN USA OR CANADA) or 571-272-1000.

/James D Anderson/

/Ardin Marschel/  
Supervisory Patent Examiner, Art Unit 1614

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